IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner,*

v.

ELMORE & STAHL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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CITATIONS

Cases:

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Petitioner, Missouri Pacific Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Texas in the above entitled case.

The writ should issue for two reasons: *First,* a state court has decided a federal question of importance in conflict with a very recent decision by the Court of Appeals for the Fifth Circuit; *Second,* the state court, contrary to the weight of authority and applicable legal principles, has imposed upon interstate carriers an unreasonable degree of responsibility with respect to

decay and spoilage of perishable commodities shipped in interstate commerce.

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 368 S.W. 2d 99, and is reprinted in the Appendix, p. 6a, *infra*. The opinion of the Texas Court of Civil Appeals is reported at 360 S.W. 2d 839 and is reprinted in the Appendix, p. 14a, *infra*. The opinion of the United States Court of Appeals for the Fifth Circuit in the case of *Trautmann Bros. Co.* v. *Missouri Pacific R.R.*, 312 F. 2d 102 (1962) is reprinted in the Appendix, p. 26a, *infra*.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on May 15, 1963 (App. p. 23a; *infra*). A timely motion for rehearing was overruled on June 12, 1963 (App. p. 25a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1958). The Court below stated that the parties had submitted the case as governed by federal law, and recognizing the applicability of federal law, it decided the case expressly as a federal question. (App. p. 8a, *infra*).

STATUTE AND REGULATIONS INVOLVED

The pertinent Act of Congress is the so-called Carmack Amendment of June 29, 1906, 34 Stat. 595, c. 3591, § 7, as amended, 49 U.S.C. § 20(11) (1958). The statute reads in relevant part:

> "Any common carrier . . . receiving property for transportation from a point in one State . . . to a point in another State . . . shall issue a receipt or bill of lading therefor, and shall be liable to the

> lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line or lines such property may pass . . .".

The full text of the statute and the pertinent regulations are set forth in the Appendix, p. 1a, *infra*.

QUESTIONS PRESENTED

1. In the case of spoilage or decay of perishable commodities transported by a common carrier in interstate commerce pursuant to a Uniform Straight Bill of Lading, does a jury finding that all transportation services covered by the Bill were performed without negligence and in full compliance with the shipper's instructions, and were performed in a prudent manner as to matters not covered by the Bill or the shipper's instructions, constitute a complete defense under the federal common law applied under the Bill?

2. In the case of spoilage or decay of perishable commodities in transit, once it is found that the interstate common carrier has performed all transportation services with due care, is the carrier entitled to the "inherent vice" exemption from liability provided under the Uniform Bill and at common law?

STATEMENT

Respondent Elmore & Stahl, fruit shippers, brought suit in a Texas state district court against petitioner, a common carrier, to recover damages for the deterioration of an interstate shipment of perishable honeydew melons. Petitioner transported for respondent 640 crates of melons from Rio Grande City, Texas, to Chicago in a refrigerator car under a Uniform Straight

Bill of Lading.[1] The Bill provides, in pertinent part, that the carrier "shall be liable as at common law" for any loss or damage. The Bill states that, "Except in case of negligence of the carrier . . . (and the burden to prove freedom from such negligence shall be on the carrier . . .) the carrier . . . shall not be liable for loss . . . resulting from a defect or vice in the property."[2]

The melons had deteriorated in transit, and it was undisputed that the deterioration was the result of spoilage and decay. (Statement of Facts, p. 249) In response to special issues submitted to them at trial, a jury found that "defendant, and its connecting carriers, performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff and in a reasonably prudent manner as to matters not covered

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[1] The carrier undertook to furnish certain protective services requested by the shipper. The shipper, who had a choice of about one hundred different classes of service, elected standard refrigeration to destination (Statement of Facts, p. 195). The responsibility of the carrier with respect to these services is governed by Rules 130 and 135 of Perishable Protective Tariff No. 17 (set out in App. p. 4a, *infra*); as to them there is liability only for "negligent failure reasonably to carry out instructions given by the shipper." *Atlantic Coast Line R.R.* v. *Georgia Packing Co.*, 164 F. 2d 1, 3 (5th Cir. 1947). See p. 12, *infra*.

The complaint contained four independent counts, each a separate claim based on damage to a different shipment of perishables. The shipment involved in this petition is solely that involved in Count I, which embraced the move of Car ART 35042 from Rio Grande City to Chicago. Entirely different shipments were involved in the other three counts, and as to them a judgment for plaintiff in the trial court was reversed for a new trial by the Court of Civil Appeals and no review was had in the Texas Supreme Court.

[2] The pertinent provisions of the Bill are set forth in the Appendix at p. 5a.

by the bill of lading or plaintiff's instructions." (Tr. p. 18) The trial court had imposed the burden of proof of this matter on the carrier. Although the case involved perishables which had decayed, the Court nevertheless submitted to the jury as a separate issue the question whether the worsened condition of the melons upon arrival "was due solely to an inherent vice . . . existing at the time the melons were received by the carrier at Rio Grande City, Texas, for transportation." (Tr. p. 19) The jury answered this question in the negative.[3]

On the basis of the special findings, the trial judge entered judgment for damages against petitioner. This ruling was affirmed on appeal by the Texas Court of Civil Appeals, 360 S. W. 2d 839 (App. p. 14a; see note 1, *supra*).

After granting a writ of error, the Texas Supreme Court affirmed the judgment. Quoting from American Jurisprudence, it determined to apply a rule stated therein that "no distinction" was to be made with respect to the liability of carriers for the transportation of "inanimate property, on the basis of its nature or

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[3] Under Texas law and practice, the failure of a jury to find the affirmative of a special issue submitted to it does not constitute an affirmative finding to the contrary. See *Morris* v. *Texas & N.O.R.R.*, 269 S.W. 2d 565, 569, 572 (Tex. Civ. App. 1954); *Gulf States Utilities Co.* v. *Grubbs*, 44 S.W. 2d 1001, 1002 (Tex. Civ. App. 1932); 41B Texas Jurisprudence, p. 780. Accordingly, the "no" answer of the jury to this question did not even constitute a positive finding that the damage to the melons did not result solely from inherent vice.

The jury found a so-called "prima facie" case for the shipper by finding (Findings 1 & 2, Tr. pp. 17-18), in substance, that the melons were in good condition at the time the Bill of Lading was signed, but in worse condition at the time of their arrival at Chicago than would reasonably have been foreseeable.

character as perishable or nonperishable." (App. p. 8a). It held that the carrier was liable for the spoilage of perishables in transit "as an insurer," although "all transportation services were performed without negligence." (App. p. 6a)[4]

The Court below acknowledged the existence of numerous decisions holding that "the common-law rule of liability as an insurer does not apply in the case of perishable goods," and that liability for spoilage of perishables under such decisions depends on negligence on the part of the carrier (App. p. 8a). The Texas Supreme Court refused, however, to follow these authorities. It was of the view that the carrier was liable for spoilage, even though it proved due care on its part.

REASONS FOR GRANTING THE WRIT

1. The instant case presents a square conflict with respect to a point of federal law[5] between the decision of the highest court of a state and a very recent decision of a federal court of appeals.

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[4] The Court stated that the carrier could exonerate itself by showing that the loss was encompassed by one of four excepted perils recognized at common law (App. p. 7a), but as we argue below the Court took an erroneous view of these exceptions. See pp. 13-14, *infra*.

[5] The Court below recognized that "the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions" (App. p. 8a). "The rights and liabilities of the parties are governed by the acts of Congress, the bill of lading, and the tariffs duly filed with the Interstate Commerce Commission. The bill of lading and the tariff have the force of a statute." *Pennsylvania R.R.* v. *Greene*, 173 F. Supp. 657, 659 (S.D. Ala. 1959). See *Peyton* v. *Railway Express Agency*, 316 U.S. 350 (1941); *Chesapeake & O. Ry.* v. *Martin*, 283 U.S. 209, 212-13 (1931).

The Court below ruled that where a claim is asserted by a shipper against a carrier for spoilage and decay of perishables, "the carrier may not exonerate itself by showing that all transportation services were performed without negligence" on its part. (App. p. 6a). On the other hand, the Court of Appeals for the Fifth Circuit ruled only five months earlier, in *Trautmann Bros. Co.* v. *Missouri Pacific R. R.*, 312 F. 2d 102 (1962), that as to perishables "A common carrier is not absolutely liable for spoilage or physical deterioration during the course of shipment. So long as the carrier has discharged its duty of reasonable care, it is not liable for 'damage to a shipment caused * * * by the operation of natural laws upon it * * *;'" (312 F. 2d at 104; App. pp. 27a-28a).

In sum, the Texas Supreme Court concluded that where a claim is made for spoilage or decay of perishables, proof of due care and faithful compliance with the shipper's instructions does not absolve the carrier, while the Fifth Circuit held precisely the opposite in a case involving exactly the same commodity (honeydew melons), and the same carrier (Missouri Pacific), which originated in a Texas federal district court. It is unnecessary at this late date to dwell upon the anomaly of a judgment favorable to the shipper if suit is brought in a Texas state court, but favorable to the carrier, in precisely the same circumstances, if suit is brought in a federal court sitting in Texas.[6] Cf. *Erie R. R.* v.

[6] The Court below acknowledged that "the concluding portion of the opinion in *Trautmann Bros. Co.* . . . seems to support petitioner's position," but it attempted to distinguish the opinion of the Court of Appeals on the theory that the spoilage in the *Trautmann* case resulted from acts of the shipper (App. pp. 11a-12a). The short answer is that this was not the foundation of the opinion by the Court of Appeals. Its decision rested solidly on

Tompkins, 304 U.S. 64, 74-75 (1938). The significance of the conflict is magnified by the fact that Texas and the other states within the Fifth Circuit are important growing centers for perishable agricultural commodities, originating an enormous volume of interstate shipments of fresh fruits and vegetables.

2. The Texas Supreme Court purported to adjudicate the liability, "as at common law," of an interstate carrier for spoilage of an interstate shipment. However, its view of the common law liability of carriers for spoilage and decay of perishable property in transit is wrong in principle and at odds with decisions by numerous courts applying the federal law, and with the leading British Commonwealth decision on this subject.

(a) In early eighteenth century common law cases, it was said that a common carrier was answerable for any loss or damage to goods entrusted to its care except for "acts of God and the enemies of the King."[7] *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107, 112

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the conclusion "that the defendant was not negligent and hence did not contribute to the spoilage" (312 F. 2d at 105; App. p. 29a). Moreover, even the District Court ruling in the *Trautmann Bros.* case, prominently mentioned by the court below, contains no finding that any act of the shipper had caused the spoilage to the melons. The discussion of the shipper's acts in the District Court's decision was solely in terms of whether, given certain acts of the shipper and the carrier's knowledge or lack of knowledge of them, the carrier performed its duties without negligence. The District Court's conclusions of law in the *Trautmann Bros.* case are, like the Court of Appeals' opinion in that case, in conflict with the decision below. (For the convenience of the Court, the District Court's conclusions of law in the *Trautmann Bros.* case are appended to the Court of Appeals' opinion, in the Appendix at p. 30a).

[7] The historical derivation of these two exceptions is traced in Holmes, *The Common Law* 201-204 (1881).

(Q.B. 1707). (Holt, C.J.). Three additional exceptions to the carrier's liability were soon recognized at common law: (i) the fault of the consignor or owner of the goods; (ii) the inherent vice or nature of the commodity; and (iii) an act by governmental authority. *Secretary of Agriculture* v. *United States,* 350 U.S. 162, 165, n. 9 (1956); Carver, *Carriage of Goods By Sea* 14 (10th ed. 1957). By the early years of the 20th Century, the common law as applied under the Interstate Commerce Act had developed a fundamental allocation of responsibility. As the Court put it in *Adams Express Co.* v. *Croninger,* 226 U.S. 491, 506 (1913): "The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such a carrier an absolute insurer, and liable for unavoidable loss or damage, though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, 'any loss or damage,' would be to ignore the qualifying words, 'caused by it.' "[8] In other words, although as to certain matters the carrier is absolutely liable "the common law did not impose a liability unrelated to the carrier's conduct." *Secretary of Agriculture* v. *United States, supra,* at 173 (concurring opinion).

(b) The relatively recent development of long distance transportation of fresh fruits and vegetables on a large scale in interstate commerce has led to the evolution of an appropriate rule governing the carrier's liability as to such property, based on this com-

[8] The Court in *Croninger* was construing the provisions of Section 20(11) of the Interstate Commerce Act, 49 U.S.C. § 20(11), which provides that the carrier shall be liable "for any loss . . . to such property *caused by it* . . ."

mon law principle. The principle that the carrier should not be subject to a liability for spoilage "unrelated to the carrier's conduct" is the basis of decisions by numerous courts applying the federal common law. These decisions absolve the carrier of liability for spoilage and decay to perishable commodities, upon proof by the carrier that it has exercised reasonable care and has handled the goods in the manner requested by the shipper.[9]

As the Arizona Supreme Court stated in so holding in 1937 in a leading and oft-cited case which the Fifth Circuit cited with approval (App. p. 28a), but which the Court below expressly declined to follow (App. p. 8a):

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[9] *Sutton* v. *Minneapolis & St. L. Ry.*, 222 Minn. 233, 23 N.W. 2d 561 (1946); *Howe* v. *Great No. Ry.*, 176 Minn. 46, 222 N.W. 290 (1928); *Missouri Pac. R.R.* v. *H. Rouw Co.*, 202 Ark. 1139, 155 S.W. 2d 693 (1941); *Railway Express Agency* v. *H. Rouw Co.*, 197 Ark. 1142, 127 S.W. 2d 251 (1939); *Southern Pac. Co.* v. *Itule*, 51 Ariz. 25, 74 P. 2d 38 (1937); *W. E. Roche Fruit Co.* v. *Northern Pac. Ry.*, 184 Wash. 695, 52 P. 2d 325 (1935); *Cassone* v. *New York, N.H. & H. R.R.*, 100 Conn. 262, 123 Atl. 280 (1924); *Daniels* v. *Northern Pac. Ry.*, 88 Ore. 421, 171 P. 1178 (1918). See also *Watson Bros. Transp. Co.* v. *Feinberg Kosher Sausage Co.*, 193 F. 2d 283 (8th Cir. 1951); *Delphi Frosted Foods Corp.* v. *Illinois Cent. R.R.*, 188 F. 2d 343, 346 (6th Cir. 1951), *cert. denied*, 342 U.S. 833 (1951); *Hamilton Foods* v. *Atchison, Topeka & Santa Fe Ry.*, 83 F. Supp. 478, 479 (S.D. Cal. 1948), *aff'd* 173 F. 2d 573 (9th Cir. 1949), *cert. denied*, 337 U.S. 917 (1949); *Frye* v. *Railway Express Agency*, 41 Tenn. App. 429, 296 S.W. 2d 362 (1955); *Railway Express Agency* v. *Shull*, 224 Ark. 476, 275 S.W. 2d 882 (1955); *Chesapeake & O. Ry.* v. *Gilbert*, 83 A. 2d 327 (D.C. Munic. Ct. App. 1951); *Watson Bros. Transp. Co.* v. *Domenico*, 118 Colo. 133, 194 P. 2d 323 (1948); *Sugar* v. *National Transit Corp.*, 82 Ohio App. 439, 443, 81 N.E. 2d 609, 611 (1948); *Ill. Cent. R.R.* v. *H. Rouw & Co.*, 25 Tenn. App. 475, 159 S.W. 2d 839 (1940); *Texas & Pac. Ry.* v. *Empacadora de Ciudad Juarez*, 309 S.W. 2d 926 (Tex. Civ. App. 1957).

> "It is a notorious fact, of which the courts may well take judicial notice, that all fruits and vegetables of every nature will ultimately decay, although no human agency has approached them after their maturity. The possibility of damages to this class of goods in shipment, without any negligence on the part of the carrier, is, in our opinion, even greater than that of damage to livestock . . . ."[10] *Southern Pac: Co.* v. *Itule,* 51 Ariz. 25, 32-33, 74 P. 2d 38, 41 (1937).

Recently, the Court of Appeals for the Ninth Circuit flatly expressed the rule in *Larry's Sandwiches, Inc.* v. *Pacific Elec. R. R.,* No. 18,265, June 3, 1963,[11] slip opinion, p. 3: "Upon proof of the perishable nature of the goods, the carrier is relieved of its insurer's liability" and the test is negligence.[12] (App., p. 36a).

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[10] It is generally recognized that "due to the peculiar nature and propensity of animals, the carrier should not be liable for injury thereto, if it ha[s] provided suitable means of transportation and exercised the degree of care which the nature of the property require[s] . . . . [Animals] may be injured, or even killed, by acts arising out of their own inherent nature and unaccompanied by any human agency or negligence." *Southern Pac. Co.* v. *Itule,* 51 Ariz. 25, 30-31, 74 P. 2d 38, 40-41 (1937); *Hafer* v. *St. Louis Southwestern Ry.,* 101 Ark. 310, 142 S.W. 176 (1911).

The Court below accepted the livestock rule but stated that the "so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables." (App. p. 12a) On the other hand, the Court in *Itule* indicated that perishable fruits and vegetables present an even more appropriate case for exonerating the carriers from liability (51 Ariz. at 33, 74 P. 2d at 41).

[11] This recent decision is reproduced in the Appendix, p. 33a, for the convenience of the Court.

[12] The decision below is in substantial conflict with the *Larry's Sandwiches* decision, and we urge this conflict also as a basis for granting the writ.

(c) Rule 130 of Perishable Protective Tariff No. 17, applicable to the shipment in this case, reflects the common law basis of the carrier's liability for the spoilage of perishable commodities, and makes clear the error committed below. That Tariff provides that "carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service . . . performed without negligence."

This Tariff clearly adopts the accepted view that at common law the carrier is not liable for the spoilage and decay of perishable commodities absent its negligence. See *Atlantic Coast Line R. R.* v. *Georgia Packing Co.*, 164 F. 2d 1 (5th Cir. 1947); *Hamilton Foods, Inc.* v. *Atchison, Topeka & S.F. R. R.*, 83 F. Supp. 478 (S.D. Cal. 1948), *aff'd*, 173 F. 2d 573 (9th Cir. 1949), *cert. denied*, 337 U.S. 917 (1949); *Delphi Frosted Foods Corp.* v. *Illinois Central R. R.*, 89 F. Supp. 55 (W.D. Ky. 1950), *aff'd*, 188 F. 2d 343 (6th Cir. 1951), *cert. denied*, 342 U.S. 833 (1951); *Larry's Sandwiches, Inc.* v. *Pacific Elec. R. R.*, *supra*. It would be an absurdity to say that as to spoilage the carrier was liable only for negligence if protective services were requested and furnished, but absolutely liable for spoilage if the shipper did not request such services. Moreover, here again, the decision below is in conflict with the Fifth Circuit's decision in *Trautmann Bros.* which makes it clear that the Perishable Protective Tariff is based on the common law rules as to perishables. See App., p. 28a.

(d) Not only does the liability of the carrier "at common law" not extend to the spoilage[13] of perishables caused without its fault, but the Bill of Lading recognizes this by providing, in terms, that absent negligence the carrier shall not be accountable for loss or damage "resulting from a defect or vice in the property." (App. p. 5a). Accordingly, under the Bill, "the duty imposed on a carrier in handling perishables is to exercise reasonable care" and the carrier is "not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *United States* v. *Reading Co.*, 289 F. 2d 7, 9 (3d Cir. 1961).

The courts below apparently labored under a misapprehension of the meaning of this clause in the Bill. They declined to view the spoilage or decay of perishable commodities as resulting from the "inherent vice or nature of the goods," absent some form of showing by the carrier that this specific shipment of perishable goods was particularly or peculiarly unfit for the journey.[14] This novel view is likewise contrary to the

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[13] The Court below indicated surprise at the petitioner's contention that different rules applied in the case of breakage as distinguished from spoilage of perishables, and that the carrier should be liable in the case of spoilage only where it can not prove its freedom from fault. See App. p. 12a. But this distinction between breakage and spoilage cases is one which is clearly made in the federal common law, as is demonstrated in Judge Hutcheson's opinion in *Yeckes-Eichenbaum, Inc.* v. *Texas Mexican Ry.*, 263 F. 2d 791, 792, 794 (5th Cir. 1959), *cert. denied*, 361 U.S. 827 (1959).

[14] It was established that the melons had spoiled and decayed; but the Texas Supreme Court, apparently on some theory that only peculiar unfitness to make the journey was covered by the exception clause, commented that "petitioner has not established that the damage in this case was caused *solely by natural deterioration*." (App. p. 13a). (emphasis original).

established federal law on the matter and again is in flat conflict with the Fifth Circuit's decision in the *Trautmann Bros.* case[18] and the Ninth Circuit's decision in the *Larry's Sandwiches* case.

The established meaning of the clause is that when damage to perishable goods arises through spoilage or decay, a case of "damage occasioned by the inherent vice or nature of the goods" is presented, and the carrier may exonerate itself by showing its freedom from fault, as petitioner did here. *United States* v. *Reading Co., supra; Trautmann Bros. Co.* v. *Missouri Pac. R. R., supra; Larry's Sandwiches, Inc.* v. *Pacific Elec. R. R., supra; Delphi Frosted Foods Corp.* v. *Illinois Cent. R. R., supra; Atlantic Coast Line R. R.* v. *Georgia Packing Co.*, 164 F. 2d 1 (5th Cir. 1947). No showing of peculiar or unusual spoilage tendencies in the perishable commodities is demanded. As the Court of Appeals for the Ninth Circuit put it in its recent decision in *Larry's Sandwiches, Inc.* v. *Pacific Elec. R. R., supra*, in the case of spoilage and decay to "perishable goods, the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the

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[18] In the *Trautmann Bros.* case some evidence had been submitted to the effect that melons grown at Laredo, the place of origination of the shipment involved there, were peculiarly prone to decay. This was contested on appeal, but the Fifth Circuit held the matter irrelevant: "Even if it is true, as appellant contends, that the District Court's finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge's additional finding that the *defendant was not negligent* and hence did not contribute to the spoilage," (312 F. 2d at 105; App. p. 29a). (Emphasis supplied). In short, once the case is one of spoilage or decay, the question is not whether the spoilage was expectable in some unusual way, but simply whether the carrier's negligence contributed to it.

goods, but to prove its own compliance with the rules of the Tariff and the shipper's instructions." (App. p. 36a).

The established construction of the clause is illumined by the decision of the House of Lords in *F. O. Bradley & Sons, Ltd.* v. *Federal Steam Navigation Co., Ltd.*, 137 Law Times Rep. 266 (1927),[16] construing provisions of the Australian Sea-Carriage of Goods Act[17] similar to those of the Bill presented here. There, the House of Lords affirmed a judgment in favor of the carrier in a suit for damages for the spoilage of a cargo of apples shipped from Australia to London. It had been found that "there had been no want of care" by the carrier. Construing the "inherent vice" clause, the House of Lords rejected the contention that to avail itself of this exception the carrier must "put a name to the vice or specify some particular inherent quality and distinguish it from all others." (App. p. 52a). As the court put it, it was enough that the apples "decayed not because of the ship or of the sea or of the route, but because they were apples . . ."; accordingly, the court held that the case was within the "inherent vice" clause.[18]

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[16] Set forth in the Appendix, p. 38a, for the Court's convenience.

[17] "[N]either the ship nor her owner . . . shall be responsible for damage to . . . the goods resulting from . . . the inherent defect, quality, or vice of the goods." § 8(2), Australian Sea-Carriage of Goods Act, Statute No. 14 of 1904.

[18] In fact, it has been common ground, even conceded in the published positions of the representatives of the interests of agricultural shippers, that the spoilage or decay of perishable goods falls within the "inherent vice" exception, and that accordingly as to such spoilage the carrier may obtain exoneration by showing its freedom from fault. See the position of the Secretary of Agriculture, "as representative of the Agricultural Community in the United States" (Brief, pp. 12-13), noted in *Secretary of Agriculture* v. *United States*, *supra*, at 165 n. 9.

As the Perishable Protective Tariff confirms, the "inherent vice" exception embraces "the inherent tendency of perishable goods to deteriorate or decay." (See p. 12, *supra*). It has never before been intimated that the exception embraced only spoilage or decay of some extraordinary or unusual nature. The Bill certainly does not support such a construction. Accordingly, it was inconsistent with established principles and erroneous for the courts below to proceed on the basis that the exception for damages "resulting from a defect or vice in the property" did not altogether embrace the decay or spoilage of perishable goods not contributed to by any fault on the part of the carrier.

3. The questions presented are of substantial importance. Perishable goods frequently spoil or decay in transit, as is notorious. The matter is accordingly a source of prolific litigation, both in the state and federal courts. In Texas alone, petitioner is presently a defendant in approximately 300 suits involving claims for roughly 900 shipments of perishable fruits and vegetables. Apart from the litigated cases, thousands of claims by shippers of perishable commodities are settled annually on the basis of the parties' views of the applicable law. In 1962, U. S. rail carriers paid a total of $8,328,470 in satisfaction of claims for carload loss and damage to fresh fruits, melons, and vegetables and frozen fruits and vegetables.[19] It is manifestly important that the law governing the responsibility for spoilage to perishable goods shipped in interstate commerce be authoritatively settled.

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[19] Ass'n of American Railroads, Freight Claim Division, Circular No. FCD 1897 (June 24, 1963).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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INDEX TO APPENDIX

APPENDIX

A. STATUTES AND REGULATIONS

(i) Interstate Commerce Act, 49 U.S.C. § 20(11):

"§ 20, par. (11). Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such

common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such

order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided. Feb. 4, 1887, c. 104, Pt. I, § 20, 24 Stat. 386; June 29, 1906, c. 3591,

§ 7, 34 Stat. 593; Mar. 4, 1915, c. 176, § 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441; Feb. 28, 1920, c. 91, §§ 436-438, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; Mar. 4, 1927, c. 510, § 3, 44 Stat. 1448; Apr. 23, 1930, c. 208, 46 Stat. 251; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 13(b), 54 Stat. 919."

(ii) Rules 130 and 135 of Perishable Protective Tariff No. 17:

"RULE 130—CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"RULE 135—LIABILITY OF CARRIERS.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

B. EXCERPT FROM UNIFORM STRAIGHT BILL OF LADING

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

C. OPINIONS IN INSTANT CASE

(i) Opinion of Supreme Court of Texas:

IN THE SUPREME COURT OF TEXAS

No. A-9323

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

ELMORE & STAHL, *Respondent*.

From Cameron County—Fourth District

On the only question presented by this appeal, we hold that after a shipper of inanimate perishables by common carrier railroad in interstate commerce has made a prima facie case of carrier liability, the carrier may not exonerate itself by showing that all transportation services were performed without negligence but must go further and establish that the loss or damage was caused by one of the four excepted perils recognized at common law.

Elmore & Stahl, respondent, brought this suit against Missouri Pacific Railroad Company, petitioner, to recover for alleged damage to three shipments of honeydew melons and one shipment of green peppers. The petition contains four separate counts, each relating to one of the shipments. Trial was to a jury and resulted in judgment on the verdict in respondent's favor on all four counts. The Court of Civil Appeals affirmed the judgment of the trial court as to Count I, but reversed such judgment and remanded the cause as to Counts II, III, and IV. 360 S. W. 2d 839.

We are concerned here only with Count I. Respondent sought thereby to recover for damage to 640 crates of honeydew melons shipped in Car ART 35042 from Rio Grande City, Texas, to Chicago, Illinois. In response to the first three special issues, the jury found: (1) that at the time the bill of lading was signed the melons were in

such condition that, based upon the orders given by the shipper to the carrier and the reasonable performance of such orders by the latter, they would have been reasonably expected to arrive at destination in good merchantable condition; (2) that upon arrival at destination the melons were in a worse condition than would reasonably have been anticipated on the basis of their condition at the time the bill of lading was signed, the orders given by the shipper to the carrier, and the reasonable performance of such orders by the carrier; and (3) that petitioner and its connecting carriers performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the plaintiff, and in a reasonably prudent manner as to matters not covered by such bill of lading or instructions. The jury refused to find that the condition of the melons upon arrival in Chicago was due *solely* to inherent vice or to the carrying out of respondent's instructions for handling the shipment. "Inherent vice" as defined in the charge included "the inherent nature of the commodity which will cause it to deteriorate with a lapse of time."

Under the general common law rule, a shipper of goods by common carrier makes a prima facie case of carrier liability by showing that the shipment was in good condition when delivered to the carrier at place of origin and in damaged condition when delivered by the carrier at destination. The carrier may then escape responsibility for the damage only by showing that it was caused solely by one or more of four excepted perils: (1) an act of God; (2) the public enemy; (3) the fault of the shipper, or (4) the inherent nature of the goods themselves. Where the loss is not due to one of these specified causes, it is immaterial whether the carrier has exercised due care or was negligent. See *Commodity Credit Corporation* v. *Norton*, 3rd Cir., 167 F. 2d 161; 13 C.J.S. Carriers § 71, p. 131. Some courts have held, however, that the general rule does not apply to

shipments of livestock, and that the carrier may escape liability for damage thereto by showing the absence of negligence on its part. See *Panhandle & S. F. Ry. Co.* v. *Wilson*, Tex. Civ. App., 135 S.W. 2d 1062 (wr. dis.).

No attack has been made on the jury findings in this case, and petitioner does not say that the damage to the melons was caused by one of the excepted perils mentioned above. It argues that carrier liability for damage to an interstate shipment of inanimate perishables is determined by the rule applicable to livestock, and that it has been exonerated by the jury's finding in response to Special Issue No. 3. Respondent insists and the Court of Civil Appeals held that the case is governed by the general common law rule. The judgment of the trial court was affirmed because petitioner did not bring itself within one of the recognized common law exceptions.

According to American Jurisprudence, no distinction is made in most jurisdictions "as respects the application of the common-law rule of liability for the same transportation and delivery of inanimate property, on the basis of its nature or character as perishable or nonperishable. In some jurisdictions, however, it is held that the common-law rule of liability as an insurer does not apply in the case of perishable goods and that liability for the loss or injury thereof depends in all cases upon negligence." 9 Am. Jur. Carriers § 693, p. 841. See also Annotation, 115 A.L.R. 1274. Perhaps the leading authority supporting the latter view is *Southern Pac. Co.* v. *Itule*, 51 Ariz. 25, 74 P. 2d 38, 115 A.L.R. 1268. The rule there laid down was recognized as sound in *Texas & Pac. Ry. Co.* v. *Empacadora de Ciudad Juarez*, Tex. Civ. App., 309 S.W. 2d 926 (wr. ref. n.r.e.). The parties here agree, however, that the liability of a carrier for damage to an interstate shipment is a matter of Federal law to be determined by the Federal statutes and decisions.

The general common law rule of carrier liability has long been recognized and applied by the Federal courts. See *Galveston Wharf Co.* v. *Galveston, H. & S.A. Ry. Co.*, 285 U.S. 127, 76 L. Ed. 659, 52 S. Ct. 342; *Commodity Credit Corp.* v. *Norton, supra; Compania de Vapores Insco, S. A.* v. *Missouri Pacific R. Co.*, 5th Cir., 232 F. 2d 657; *Lehigh Valley R. Co.* v. *State of Russia*, 2nd Cir., 21 F. 2d 396; *Reider* v. *Thompson*, 116 F. Supp. 279. In *Schnell* v. *The Vallescura*, 293 U.S. 296, 79 L. Ed. 373, 55 S. Ct. 194, which was a suit in admiralty to recover for damage resulting from decay of a shipment of onions, the Supreme Court of the United States discussed the rule which requires the carrier to establish that the loss was due to some excepted peril, and said:

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."

Petitioner directs our attention to the provisions of the Carmack Amendment that any common carrier shall be liable "for any loss, damage, or injury * * * caused by it or by any common carrier * * * to which such property may be delivered." 49 U.S.C.A. § 20(11). This statute does not alter or modify the basic common law rule of carrier liability with which we are here concerned. See *Cincinnati, N.O. & T.P. R. Co.* v. *Rankin*, 241 U.S. 319, 60 L. Ed. 1022, 36 S. Ct. 555; *Secretary of Agriculture* v. *United States*, 350 U.S. 162, 100 L. Ed. 173, 76 S. Ct. 244. Petitioner also relies on Rules 130 and 135 of the Perishable Protective

Tariff No. 17, which are quoted in the margin,[1] and has cited a number of cases where the courts have said that these rules operate to limit the carrier's liability.

The reasoning of the courts in some cases is obscured by declarations that the carrier is or is not an insurer, and by statements indicating that the shipper, by establishing delivery to the carrier in good condition and receipt at destination in damaged condition, makes out a prima facie case of negligence on the part of the carrier. Where the common law rule is strictly enforced, the carrier is not an insurer with respect to damage caused solely by one of the excepted perils, but its responsibility is similar to that of an insurer in so far as other risks are concerned. And as pointed out in *Chesapeake & O. Ry. Co.* v. *Thompson Mfg. Co.*, 270 U.S. 416, 70 L. Ed. 659, 46 S. Ct. 318, the so-called presumption of negligence is not a presumption at all but is a rule of substantive law under which the carrier is liable for failure to transport safely unless the loss or damage is due to one of the specified causes.

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[1] "Rule 130—Condition of Perishable Goods Not Guaranteed By Carriers.—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"Rule 135—Liability of Carriers.—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carrier is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

As we construe Rules 130 and 135, they simply provide that by furnishing protective services the carrier does not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, and will not be responsible, in the absence of negligence, for damage due to the fault of the shipper or the inherent nature of the goods themselves. The cases upon which petitioner relies do not hold otherwise. For example, specific acts of negligence were alleged by the plaintiff in *Atlantic Coast Line R. Co.* v. *Georgia Packing Co.*, 5th Cir., 164 F. 2d 1, and it was held that proof of compliance with the shipper's instructions constituted a defense to the allegations of negligence in the furnishing of protective services. In *Delphi Frosted Foods Corp.* v. *Illinois Central R. Co.*, 6th Cir., 188 F. 2d 343, the shipper failed to establish that the fruit was in good condition when delivered to the carrier. While the Court of Appeals for the Fifth Circuit has observed that damage resulting from breakage of crates is different from spoilage due to inherent vice, it did not say that the carrier may exonerate itself without establishing that the case falls within the latter exception. See *Yeckes-Eichenbaum, Inc.* v. *Texas Mexican Ry. Co.*, 5th Cir., 263 F. 2d 791. In considering whether the shipper had shown negligence on the part of the carrier in *Chesapeake & O. Ry. Co.* v. *Thompson Mfg. Co.*, *supra*, the court was concerned only with the right of the plaintiff to maintain suit without having given prior written notice of the claim. The applicable statute provided that such notice would not be required if the goods were damaged in transit by carelessness or negligence.

The concluding portion of the opinion in *Trautmann Bros.* v. *Missouri Pac. R. Co.*, 5th Cir., 312 F. 2d 102, seems to support petitioner's position, but the entire opinion must be read in the light of the trial court's findings. The shipper there prepared the car by using electric fans and thus melted ice which was required for refrigeration. The carrier was not notified of this action, with the result that the ice supply was not replenished, and many of the melons

were found to be overripe and spoiled when they were unloaded at destination. Under these circumstances the trier of fact could well conclude, as he did, that the overripe condition of the melons was caused by excepted perils, i.e., the inherent nature of the perishables and the failure of the shipper to notify the carrier of the manner in which the car was prepared. Although the Court of Appeals referred to the Itule case in a footnote, its decision appears to be simply another application of the rule, as stated in the opinion, that "so long as the carrier has discharged its duty of reasonable care, it is * * * not liable for damages occasioned solely by the inherent nature, or vice, of the goods themselves" or "for damages caused solely by the acts or directions of the shipper."

The so-called livestock rule is based, at least in part, upon considerations which have no application in the case of inanimate perishables. We know that honeydew melons do not have the propensities of Brahma cattle, and are not likely to bite each other or kick the slats out of crates. Petitioner apparently recognizes that the rule it urges us to adopt would not be applicable where the carrier had failed to deliver a shipment of perishables, or in case of bruising, crate breakage or damage by fire. It seems to be saying that when the claim is for spoilage or decay, the carrier should have the benefit of a presumption that the damage was due solely to natural deterioration. We do not agree.

Neither the Congress nor the Federal courts have declared that the liability of a common carrier for damage to inanimate perishables may be predicated only upon negligence. The shipment in the present case was made under a Uniform Straight Bill of Lading which, unlike the Uniform Live Stock Contract prescribed by the Interstate Commerce Commission, states that the carrier shall be liable as at common law except as therein provided. The bill of lading then stipulates that the carrier shall not be liable for

loss or damage caused by certain excepted perils, but there is no provision exempting it from liability for damage to perishables not caused by its own negligence. From a consideration of the terms of the bill of lading and the general common law rule as recognized and applied by the Federal courts, it seems clear to us that the Court of Civil Appeals properly refused to follow the Itule case. A common carrier is not responsible for spoilage or decay which is shown to be due entirely to the inherent nature of the goods, but petitioner has not established that the damage in this case was caused *solely by natural deterioration.*

The judgment of the Court of Civil Appeals is affirmed.

RUEL C. WALKER
Associate Justice

Opinion delivered:
May 15, 1963

(ii) Opinion of Texas Court of Civil Appeals:

No. 13937

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant*,

v.

ELMORE & STAHL, *Appellee*.

Appeal from Cameron County
On Motion for Rehearing

Our original opinion, filed June 27, 1962, is withdrawn and this opinion substituted in its place.

This suit was instituted by Elmore & Stahl as shipper against Missouri Pacific Railroad Company as carrier, for alleged damages to four shipments, three of which were of honeydew melons originating at Rio Grande City, Texas, and one of green peppers originating at Pharr, Texas, with destination points of the melons at Chicago, Illinois, and Boston, Massachusetts, and of the green peppers at Indianapolis, Indiana.

The trial was to a jury and resulted in judgment in favor of plaintiff on all four counts contained in the petition, from which judgment Missouri Pacific Railroad Company has prosecuted this appeal.

Appellee's petition contained four separate counts, and each of these counts, in effect, is a separate lawsuit. The first count relates to 640 crates of honeydew melons, loaded in Car ART 35042; the second relates to 640 crates of honeydew melons, loaded in Car ART 33450; the third relates to 560 crates of honeydew melons, loaded in Car ART 51395; and Count IV relates to 700 baskets of green peppers, loaded in Car ART 52223.

The cause was submitted to the jury upon nine special issues as to each count in the petition, and these issues are very similar as to each of the four counts. They vary only as to the peculiar facts of each count.

Appellant's Point Number One is as follows:

"Judgment should have been rendered in favor of the Carrier on Count I of the petition because:

(a) The jury finding on Special Issue Number Three establishing that the carriers performed without negligence the transportation services as provided by the terms of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions, constituted a complete defense where the shipper relied upon a prima facie case, and the carrier was not further required to prove the specific cause of the loss.

(b) The responsibility assumed by a carrier of perishables is fixed by the agreement contained in the bill of lading in accordance with published tariffs and regulations, which are binding upon the shipper and carrier and may not be waived or varied; the tariff provisions have the force of law and constitute part of the contract between the shipper and carrier, and the effect of same is to limit and define the contractual undertaking of the carrier to carrying out the shipper's instructions and performance of transportation services without negligence.

(c) The correct rule applicable to shipments of perishables is the same as that involving shipments of livestock, that is, the carrier is exonerated from liability upon showing compliance with the shipper's instructions and performance without negligence of transportation services; and the carrier is not required to additionally prove the cause of the shipper's loss or damage.

(d) At common law, the carrier was under no duty to furnish special protective services such as refrig-

> erator cars, icing or ventilation, and any duty, obligation or liability of the carrier concerning such matters depended upon the agreement between the shipper and the carrier and was entirely distinct from and could not be based upon its general liability as a common carrier."

The jury found, in answer to Special Issue No. 1, that the honeydew melons referred to in Count I were in such condition at the time the bill of lading was signed that, based upon the orders given by the shipper to the carrier for their transportation, and the reasonable performance of those orders by the carrier, they would have been reasonably expected to arrive at destination in good merchantable condition.

In answer to Special Issue No. 2, the jury found that such melons were in worse condition than would reasonably have been anticipated, based upon the condition in which they were at the time the bill of lading was signed, the orders given by the shipper to the carrier for their transportation and reasonable performance of those orders by the carrier.

Under the provisions of the Interstate Commerce Act, 49 U.S.C.A. § 20 (11), which provides in part as follows:

> "Any common carrier, railroad, * * * receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered * * * ."

and under the evidence and findings of the jury, the shipper made out a prima facie case of liability against the carrier.

13 C.J.S. 131, § 71; *Panhandle & S. F. Ry. Co.* v. *Trautmann Bros.*, 341 S.W. 2d 504; *Missouri-Kansas-Texas R. Co.* v. *Noble*, 271 S.W. 2d 146; *Rogers* v. *Crespi & Co.*, 259 S.W. 2d 928; *Railway Exp. Agency* v. *Hueber*, 191 S.W. 2d 710; *Panhandle & S. F. R. Co.* v. *Wilson*, 135 S.W. 2d 1062.

It is the contention of the shipper that the carrier can only defend against this prima facie cause of action by showing that the damages were due to one or more of the excepted causes at common law; viz., (1) an act of God, (2) the public enemy, (3) the act of the shipper, (4) the inherent nature of the goods themselves.

The jury found, in answer to Special Issue No. 3, that as to the honeydew melons described in Count I, the carrier performed without negligence the transportation services as provided by the terms and conditions of the bill of lading and as instructed by the shipper and in a reasonably prudent manner as to matters not covered by the bill of lading or the shipper's instructions.

In answer to Special Issue No. 4, the jury found that as to the honeydew melons described in Count I, the worsened condition on arrival was not caused by the failure of the carrier to comply with the instructions of the shipper and furnish all services provided by the terms and conditions of the bill of lading.

The jury further found, in answer to Special Issue No. 5, that the worsened condition of the melons on arrival was not in any part caused by the failure of the carrier to transport and care for the melons in a reasonably prudent manner as to all matters not covered by shipper's instructions and the bill of lading.

In answer to Special Issue No. 6, the jury found that the worsened condition of the honeydew melons referred to in Count I, at the time of their delivery at destination, was not due solely to an inherent vice existing at the time the

melons were received by the carrier at Rio Grande City, Texas.

The jury further found, in answer to Special Issue No. 7, that the worsened condition of the melons at destination was not caused solely by the carrier carrying out the instructions given by the shipper to the carrier for handling this shipment.

In answer to Special Issues Nos. 8 and 9, the jury established the loss in market value of the melons due to the worsened condition at destination.

It is the contention of appellant carrier that the jury's answers to the Special Issues show that the carrier carried out the instructions of the shipper and was not otherwise negligent, and that this is a complete defense to the prima facie case established by the shipper, while it is the contention of appellee shipper that the only defense to the prima facie cause of action established by it is to show that the loss was due to one of the excepted causes set out above.

It is conceded by the parties that where an interstate shipment is involved, the liability of the carrier and the measure of damages are determined by the Interstate Commerce Act and the decisions of the Courts of the United States, construing it. See *Missouri Pacific Railroad Co.* v. *Duncan*, 353 S.W. 2d 315; *Missouri-Kansas-Texas R. Co.* v. *Noble*, supra.

There are a great many authorities discussing the question here presented, and we are of the opinion that, by the great weight of authorities, the contention of the appellee shipper is sustained. *Panhandle & S.F. Ry. Co.* v. *Trautmann Bros.*, 341 S.W. 2d 504; *Missouri Pac. R. Co.* v. *Trautmann Bros.*, 301 S.W. 2d 240; *Thompson* v. *Bob Tankersley Produce Co.*, 289 S.W. 2d 840; *Thompson* v. *A. J. Tebbe & Sons Co.*, 341 S.W. 2d 627; *Schnell* v. *The Vallescura*, 79 L. ed., 373, 293 U.S. 296, 307; *Lehigh Valley*

R. Co. v. *State of Russia*, 21 F. 2d 396; *Compares de Vapores Insco S. A.* v. *Missouri Pac. R. Co.*, 232 F. 2d 657; *Reider* v. *Thompson*, 116 F. Supp. 279; *Secretary of Agriculture* v. *United States*, 100 L. ed. 173, 350 U.S. 160; *Yeckes-Eichenbaum, Inc.* v. *Texas Mexican Ry. Co.*, 264 F. 2d 791, cert. den., 4 L. ed. 2d 70; *California Packing Corp.* v. *The Empire State*, 180 Fed. Supp. 19; *Southern-Plaza Empress, Inc.* v. *Neal Nerville, Jr.* 233 F. 2d 504; *U. S.* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381; *California Packing Corp.* v. *States Marine Corp. of Del.*, 187 F. Supp. 540; Interstate Commerce Act, Title 49 U.S.C.A., § 20(11); 13. C.J.S. p. 131, § 71, p. 151, § 79. Tariff Rules Nos. 130 and 135, found in Title 49 U.S.C.A., § 20(11), in no way affect the rules laid down in the above cited authorities. We refuse to follow *Southern Pacific Co.* v. *Itule*, 74 P. 2d 38, 115 A.L.R. 1268, wherein it is held that the carrier's liability with relation to the transportation of vegetables is the same as for livestock, because such holding is contrary to the above cited cases.

This brings us to a consideration of Count II of appellee's petition. Appellant's Point Number Two is as follows:

> "Judgment should have been rendered in favor of the carrier on Count II of the petition because:
>
> (a) There was no evidence, or at least the evidence was insufficient, to establish the condition, particularly the good condition, of the honey dew melons at origin.
>
> (b) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without any damage; and there is not a sufficient basis for ascertainment of damages if appellee is entitled to recover the same."

We sustain this point. The evidence is insufficient to support the finding of the jury that the melons were in good

condition at the point of origin. The shipper relied upon the recital in the bill of lading to the effect that the melons were in apparent good condition, and the testimony of John Fillpot. The recital in the bill of lading relates only as to the condition of the outside of the crates, and this rule is not changed even though honeydew melons are so crated that a part of each melon can be seen without opening the crates. *Hoover Motor Express Co.* v. *U. S.*, 262 F. 2d 832.

John Fillpot did not inspect the melons at point of origin. He was asked the direct question whether he could say that he saw "a single one of the melons involved in this case." He answered, "I cannot." He was in general charge of gassing and cooling the melons, but the man who actually did this work did not testify. There was no other testimony as to the condition of the melons at origin than the general statements by Fillpot. We reverse the judgment of the trial court on Count II.

Appellant's Point Number Three is as follows:

> "Judgment should have been rendered in favor of the carrier on Count III of the petition because:
>
> (a) The jury finding on Special Issue Number One, establishing that the honeydew melons involved were not in good condition at origin, that is, they would not reasonably have been expected to arrive at destination in good merchantable condition, based upon the orders of the shipper and the reasonable performance of same by the carrier, prevented judgment for the shipper, where the shipper relied solely on a prima facie case."

The finding of the jury on Special Issue No. 1, on Count III, precluded any recovery by the shipper on Count III. *Missouri Pacific R. Co.* v. *Trautmann Bros.*, 301 S.W. 2d 240; *Thompson* v. *Bob Tankersley Produce Co.*, 289 S.W.

2d 840; *Albers Milling Company* v. *Hauptman*, 95 F. 2d 286.

Appellant's Point Number Four is as follows:

> "Judgment should have been rendered in favor of the carrier on Count IV of the petition because:
>
> (a) There was no evidence, or, at least the evidence was insufficient, to establish the market value of the commodity at destination, even if the shipment had arrived without damage; and there is not a sufficient basis for ascertainment of damages, if appellee is entitled to same.
>
> (b) The jury award is excessive."

We sustain this point. Appellee in attempting to establish the market value of the peppers relied entirely upon the testimony of Ed Baker. There were no United States Department of Agriculture Market Reports introduced in evidence as to the peppers, and there were no other market reports introduced. Baker admitted that he did not know the market price of U. S. No. 1 peppers on January 26, 1958, in Indianapolis. He based his opinion as to the market value of these peppers upon the account of sales showing that some of them sold for the sum of $4.00 per basket. In the recent case of *Missouri Pacific Railroad Co.* v. *Duncan*, 353 S.W. 2d 315, the Austin Court, speaking through Associate Justice Richards, had this to say:

> "It is a general rule of law that an account of sales alone is incompetent to establish the reasonable cash market value of a shipment in the condition and on the date of its arrival. *Rio Grande & E.P. R. Co.* v. *T.A. Austin*, supra; *Thompson* v. *A. J. Tebbe & Sons Co.*, Tex.Civ.App., 241 S.W. 2d 627, 632; *Reider* v. *Thompson*, (U.S.C.A. 5th) 197 F. 2d 158, 160."

Appellee's motion for a rehearing will be overruled, and appellant's motion for a rehearing will be granted in part and overruled in part in keeping with this opinion.

Our judgment heretofore rendered herein is set aside and judgment entered in accordance with this opinion; i.e., the judgment of the trial court is affirmed as to Count I, and reversed and remanded as to Counts II, III and IV. The costs of this appeal are taxed one-fourth against appellant and three-fourths against appellee.

W. O. MURRAY
Chief Justice

Opinion delivered and
filed September 12, 1962

D. JUDGMENT OF TEXAS SUPREME COURT AND ORDER DENYING MOTION FOR REHEARING

IN THE SUPREME COURT OF TEXAS

AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.

v.

ELMORE & STAHL

From Cameron County, Fourth District.

(May 15, 1963)

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was no error in the judgment of the Court of Civil Appeals, as follows:

"The motion of Appellant for Rehearing, filed July 11, 1962, coming on to be heard, and it appearing to the Court that there was error in the judgment of this Court, rendered on June 27, 1962, affirming in part and reversing and rendering in part the judgment of the Court below, it is therefore considered, adjudged and ordered that said motion be, and it is hereby granted in part and overruled in part. The judgment of this Court rendered on June 27, 1962, is set aside and judgment here rendered as follows:

"This cause came on to be heard on the transcript of the record, and same being examined, because it is the opinion of the Court that there was no error in the judgment of the Court below in rendering judgment against appellant on Count One, and in favor of appellee, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby, affirmed.

"But because it is the opinion of the Court that there was error in the judgment of the Court below wherein it rendered judgment on Counts II, III and IV against appellant, it is therefore considered, adjudged and ordered that said judgment in that respect be, and it is hereby reversed and the cause remanded to the Court below for a new trial in accordance with the opinion of this Court.

"It is further ordered that Appellant, Missouri Pacific Railroad Company, and surety, Fidelity and Deposit Company of Maryland, pay one-fourth of the costs of this Court, and Appellees, Elmore & Stahl, pay three-fourths of the costs in this Court in this behalf expended and incurred, and that this decision be certified below for observance."

it is, therefore, adjudged, ordered and decreed that the judgment of the Court of Civil Appeals be, and is hereby, affirmed, in accordance with the opinion herein this day delivered.

It is further ordered that the costs expended and incurred in this cause in the Court of Civil Appeals remain as assessed by the judgment of that Court and that petitioner, Missouri Pacific Railroad Company, and the surety on its cost bond on appeal, Fidelity and Deposit Company of Maryland, pay all costs in this cause expended and incurred in this Court, and that this decision, with a copy of the opinion herein this day delivered, be certified to the District Court of Cameron County, Texas, for observance.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the attached and foregoing page contains a true and correct copy of the judgment of the Supreme Court of Texas in the case of *Missouri Pacific Railroad Company* v. *Elmore & Stahl*, No. A-9323, from Cameron County, Fourth District, as such judgment appears in the minutes of said Court under the date of May 15, 1963.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 9th day of July, 1963.

GEO. H. TEMPLIN, *Clerk*

GARSON R. JACKSON
By Garson R. Jackson, *Deputy*

IN THE SUPREME COURT OF TEXAS
AUSTIN

No. A-9323

MISSOURI PACIFIC RAILROAD CO.
v.
ELMORE & STAHL

From Cameron County, Fourth District.

(June 12, 1963)

Motion of petitioner for rehearing, filed in above numbered and entitled cause on May 30, 1963, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of order of the Supreme Court of Texas on motion for rehearing of cause in the case of *Missouri Pacific Railroad Company* v. *Elmore & Stahl*, No. A-9323, from Cameron County, Fourth District, as such order appears in the minutes of said Court under the date of June 12, 1963.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 9th day of July, 1963.

GEO. H. TEMPLIN, *Clerk*

GARSON R. JACKSON
By Garson R. Jackson, *Deputy*

E. OPINION OF COURT OF APPEALS FOR FIFTH CIRCUIT. TRAUTMANN BROS. CO., INC. v. MISSOURI PACIFIC RAILROAD CO.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19813

TRAUTMANN BROS. CO., INC., *Appellant*,

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Appellee*.

Appeal from the United States District Court for the Southern District of Texas.

(December 27, 1962)

Before HUTCHESON, WISDOM and GEWIN, *Circuit Judges*.

HUTCHESON, Circuit Judge: The appellant filed this suit to recover for damages to six cars of honeydew melons, transported by defendant from Laredo, Texas, to Philadelphia, Pennsylvania. After trial without a jury, the judge held that the defendant was not liable, except for a small part of the damages.[1]

At Laredo, the melons were loaded into the cars and iced, under plaintiff's directions, and one Fillpot, an employee of the plaintiff, then pre-cooled the cars with electric fans. The cars did not come under the control of the defendant rail-

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[1] As to two cars of the melons, the parties agreed to a settlement and separate judgment was entered. The judge found that the damages to the four other cars amounted to $1,920.67, of which, however, the defendant was liable for only $90.64.

road until Fillpot had completed his pre-cooling operations. The plaintiff offered the testimony of witnesses, who had grown and harvested the melons, that the melons were in good condition when they reached the cars at Laredo; and the testimony of another of plaintiff's witnesses, who had been employed to supply gas to the melons after loading, was to the same effect. The defendant did not replenish the ice bunkers at Laredo but waited until San Antonio was reached so that there was a lapse of about twenty-four hours before the cars were re-iced. The cars reached Palestine, Texas, on the following day, where defendant maintains an icing station, which, as to this particular train, was for emergency purposes only, but the cars were not re-iced there. The ice bunkers were refilled when the cars reached Texarkana. When the melons were unloaded in Philadelphia, many of them were found to be overripe and spoiled.

The trial judge found that the temperature in the cars was from forty-five to fifty degrees upon arrival in Philadelphia; and, as the railroad had re-iced the cars at all of the regular stations, that the temperature had probably been kept at the same level throughout the trip, there being no evidence to the contrary. He also found that the ice bunkers were not full when the cars left Laredo, because the cooling fans used by Fillpot had caused the ice to melt much more rapidly than usual; however, as the defendant had no knowledge of these special cooling operations, it was under no duty to re-ice at Laredo. Further, the judge found that the melons were prone to spoilage, on the basis of the following facts: (1) raising such melons in Laredo was a new venture in 1957, when this shipment was made, and was not continued; and (2) forty-nine claims for decay and overripeness had arisen from the fifty-two shipments of Laredo melons.

We deal first with appellant's contention that the trial court erred in holding that the defendant was not an insurer. The district judge was correct. A common carrier is

not absolutely liable for spoilage or physical deterioration during the course of shipment.[2] So long as the carrier has discharged its duty of reasonable care, it is not liable for "damage to a shipment caused . . . by the operation of natural laws upon it . . .;"[3] that is, the carrier is not liable for damages occasioned solely by the inherent nature, or vice, of the goods themselves. Nor is the carrier liable for damages caused solely by the acts or directions of the shipper.[4]

The contract between the parties in this case does not render those general rules inapplicable. The bill of lading under which the melons were shipped provided that the carrier received the shipment "subject to the classifications and tariffs." Two such tariff provisions were Rules 130 and 135 of Perishable Protective Tariff No. 17.[5] These rules serve as we have observed previously, to "limit the liability

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[2] See, *e.g.*, Atlantic Coast Line R. Co. v. Georgia Packing Co., 5th Cir. 1947, 164 F. (2) 1; Southern Pacific Co. v. Itule, Ariz. 1937, 74 P. 2d 38, 115 A.L.R. 1268; Texas & Pac. Ry. Co. v. Empacadora De Ciudad Juarez, Tex. Civ. App. 1958, 309 S.W. 2d 926, 936-37 (on motion for rehearing), writ refused, n.r.e.

There is an obvious distinction between damage of that type and damages resulting from crate breakage or physical breakage. See Yeckes-Eichenbaum, Inc. v. Texas Mexican Ry. Co., 5th Cir. 1959, 263 F. (2) 791.

[3] Austin v. Seaboard Air Line R. Co., 5th Cir. 1951, 188 F. (2) 239, 240. See 9 Am. Jr., Carriers Sec. 725 (1937).

[4] Austin v. Seaboard Air Line R. Co., supra, note 4. See 9 Am. Jr., Carriers, Sec. 728 (1937).

[5] Rule 130 provides: "*Conditions of perishable goods not guaranteed by carriers.*—Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service of the kind and extent requested by the shipper, performed without negligence."

Rule 135 provides: "*Liability of Carriers.*—Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to

of a carrier transporting perishable goods to liability for negligent failure reasonably to carry out instructions given by the shipper.'"[6] Nothing in Section 20 (11) of the Transportation Act, 49 U.S.C. Sec. 20 (11) precludes a carrier's limiting its liability in that manner, notwithstanding appellant's contention to the contrary. The section provides simply that a carrier cannot limit its liability for damages *caused by the carrier.*

Fact issues were therefore raised by the evidence.

Conceding, as appellant contends, that once it introduced evidence showing that the melons were in good condition when delivered to defendant but were spoiled upon arrival at their destination, it had established a *prima facie* case of liability of the appellee, so that the burden shifted to the appellee, we are of the opinion that the appellee carried that burden. Even if it is true, as appellant contends, that the district court's finding of inherent vice was based upon improper inferences from general conditions at Laredo, the evidence is nevertheless ample to support the judge's additional finding that the defendant was not negligent and hence did not contribute to the spoilage. The evidence shows that the train was re-iced at the regular stations; and appellee, being without knowledge of the pre-cooling operations, was under no duty to re-ice at Laredo.

We have considered all of appellant's arguments and none of them, in our opinion, warrants reversal. The judgment is accordingly

Affirmed.

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such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

[6] Atlantic Coast Line R. Co. v. Georgia Packing Co., supra, note 2.

F. CONCLUSIONS OF LAW OF THE DISTRICT COURT IN TRAUTMANN BROS. CO. v. MISSOURI PACIFIC RAILROAD CO.

I.

Plaintiff made out a prima facie case of defendant being liable before it rested its case.

II.

Upon the plaintiff making out such a prima facie case as above the burden of proceeding with the evidence shifted to the defendant. However, the burden of proof as distinguished from the burden of proceeding does not change and remains on plaintiff. Defendant sustained this burden of proceeding with the evidence. It rebutted any such prima facie case or presumption in plaintiff's favor.

III.

Upon the carrier overcoming, as it did, the shipper's prima facie case, plaintiff again had the burden of proceeding with the evidence and it continued to have the burden of proof. Plaintiff did not sustain this burden.

IV.

When a shipment of a perishable commodity like honeydew melons arrives at destination showing damage and the carriers show that they handled the shipment in the manner specified by the shipper and that they exercised reasonable care to prevent damage from any cause not necessarily involved in the method of transportation so chosen by the shipper, the carriers have established a defense to the shipper's action for damages. That was established here.

V.

The rules of law announced by the Supreme Court of Arizona in *Southern Pacific Company* v. *Itule*, 74 P.2d 38, 115 A.L.R. 1268, apply to these interstate shipments of perishables.

VI.

Defendant and its connecting carriers are not insurers that shipments of perishable commodities such as honey-dew melons would be in good condition and undamaged at destination.

VII.

Plaintiff is charged with knowledge of the provisions of Perishable Protective Tariff No. 17.

VIII.

The provisions of the Perishable Protective Tariff No. 17 were part of the contract of shipment between the plaintiff and the carriers. These provisions were effective to specify the terms and conditions of the protective service plaintiff was entitled to have the carriers perform under the instructions given by the shipper and to excuse the carriers from liability for damage not caused by improper carrier service, but rather due to plaintiff's directions being inadequate, incomplete, or ill-conceived, or to the inherent tendency of the shipment to deteriorate and decay.

IX.

The carrier is not responsible for the effects of the shipments not being re-iced at Laredo but rather this was due to the failure of the plaintiff to advise the defendant of the cooling activities carried on by Fillpot, or to re-ice the shipment or to pay the carrier for the ice so consumed in cooling operations which would have resulted in the car being re-iced by defendant before being switched from the ice company dock. When, as here, a shipper pre-cools a shipment, he must do so with his own ice, but if he uses the ice of the railroad, he must notify the railroad and pay extra charges so that the railroad can then be charged with the responsibility of re-icing the car at origin, unless the shipper replenishes it himself.

X.

Plaintiff is entitled to recover from defendant the amounts of the physical damage [breakage] as set out above in Paragraph XXVII of the Findings of Fact. Plaintiff is not entitled to recover any additional amount and defendant is discharged of all additional claims of liability.

XI.

If, however, on appeal this judgment should be reversed and it should be held that plaintiff is entitled to recover its damages, then I find and hold that the full amounts of damage and amounts of balance recoverable (the full damage less the physical injury which plaintiff is recovering) are as follows:

Count	Full Damage	Physical Injury	Balance Recoverable
II	$586.41	$12.22	$574.19
III	350.64	72.50	278.14
IV	379.73	2.22	377.51
VI	603.89	3.70	600.19

XII.

All recovery, except for such physical damage, is denied. In view of the agreed settlements, costs are awarded to plaintiff.

These findings supplement and do not supercede the findings announced orally at the conclusion of the trial.

Signed for entry at Corpus Christi, Texas this 23rd day of January, 1962.

Reynalda G. Gay
Judge Presiding

G. OPINION OF COURT OF APPEALS FOR NINTH CIRCUIT, LARRY'S SANDWICHES, INC. v. PACIFIC ELECTRIC RAILWAY CO.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,265

June 3, 1963

LARRY'S SANDWICHES, INC., a California corporation,
Appellant,

v.

PACIFIC ELECTRIC RAILWAY CO., a California corporation,
Appellee.

Upon Appeal From the United States District Court for the Southern District of California, Central Division

Before: JERTBERG and MERRILL, Circuit Judges, and WEIGEL, District Judge

MERRILL, Circuit Judge:

Appellant is suing appellee railroad under the Carmack amendment to the Interstate Commerce Act, 49 U.S.C. section 20(11), to recover for damages to a shipment of frozen sandwiches delivered by appellant to the railroad at Culver City, California, for shipment to Chicago. Upon arrival at Chicago it was discovered that some of the sandwiches were not in a frozen condition. The shipment was rejected by the consignee and returned by the railroad to appellant in California.

This appeal presents the related problems of the nature of the carrier's obligation respecting shipments of frozen food, and the burden of proof as to the cause of damage suffered by such a shipment en route.

The sandwiches were not subject to visual inspection at the time of loading, since they were individually wrapped in foil, sealed and placed in cardboard boxes which in turn

were placed in corrugated paper cases and sealed with tape. The lading was not subject to observation en route, since the car was loaded by appellant and the doors were sealed at origin and were not unsealed until arrival at destination.

The bill of lading recited that the shipment was received by the railroad "in apparent good order, except as noted (contents and condition of contents unknown)."

Appellant presented evidence as to the manner in which it had prepared the sandwiches for shipment, and the manner in which they had been loaded. Unquestionably it made out a sufficient prima facie case that the lading was delivered to the carrier in good order.

The railroad offered evidence as to the car's refrigerating performance (as determined by the record of thermometer readings within the car) to show that the participating carriers had exercised ordinary care and had fully satisfied the requests of the shipper for refrigerated protective service and the protective tariff rules applicable to perishable goods. Further it endeavored to show that there was a reasonable possibility that the shipment was not completely frozen when loaded in Culver City.

The district court found that the railroad had carried out the shipping instructions and complied with all tariff rules, and that appellant had failed to show negligence on the railroad's part.

Appellant asserts that the district court erroneously failed to impose upon the railroad the proper standard of duty and burden of proof. It contends that the railroad should be held liable as insurer unless it met the burden of establishing that the damage had resulted from the condition of the goods at the time of loading.

The Carmack amendment has been construed as codifying the common law rule of a carrier's liability. See *Secretary of Agriculture* v. *U. S.* (1956) 350 U.S. 162, 165, n. 9. At common law, a carrier transporting durable goods

was under an insurer's obligation and liable for all damage to such goods without proof of negligence, unless it was able affirmatively to show that the damage was occasioned by one of five specific causes: the shipper, acts of God, the public enemy, public authority or the inherent vice or nature of the commodity. See, e.g., *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.* (1926) 270 U.S. 416, 421-422.

Thus, at common law "a carrier was not liable for damage occasioned by the inherent vice or nature of the goods in the absence of negligence." *U. S.* v. *Reading Company* (3 Cir. 1961) 289 F. 2d 7, 9; See *Secretary of Agriculture* v. *U. S.*, supra.

Where perishable goods are involved the provisions of the Carmack amendment codifying the common law are given force through the Perishable Protective Tariff No. 18 of the General Rules and Regulations of the Interstate Commerce Commission. Rules 130 and 135 of that tariff[1] establish the tests of negligence.

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[1] "Rule 130

CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS

Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"Rule 135

LIABILITY OF CARRIERS.

Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

Upon proof of the perishable nature of the goods the carrier is relieved of its insurer's liability, and its duty becomes one "to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper • • •." (Rule 135).

Thus, in the case of perishable goods the burden upon the carrier is not to prove that the damage resulted from the inherent vice of the goods, but to prove its own compliance with the rules of the tariff and the shipper's instructions. See e.g., *U. S.* v. *Reading Company*, supra; *Illinois Packing Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.* (7 Cir. 1956) 236 F. 2d 908, 909-910; *Delphic Frosted Foods Corp.* v. *Illinois Central R. Co.* (6 Cir. 1961) 188 F. 2d 343, 346-347.

Appellant contends that it is error to regard frozen foods as perishable. It asserts that freezing renders food inanimate, and that in a properly refrigerated environment this condition would continue indefinitely.

We cannot agree. The furnishing of an artificial environment does not confer an imperishable status upon that which normally would be recognized as perishable. Rather it is the perishable character of frozen goods which requires that they be protected by an artificial environment. Were appellant's argument to be accepted no commodity ordinarily subject to deterioration could be classified as perishable so long as it was presented to the railroad in a frozen condition. The tariff for perishable goods would be rendered meaningless.[2]

Appellant asserts error in the failure of the district court explicitly to find as to the condition of the goods on delivery to the railroad. The court found only (in the words

[2] Other courts faced with this problem have classified frozen foods as perishable. See, e.g., *Delphic Frosted Foods Corp.* v. *Illinois Central R. Co.*, supra (frozen fruit); *Illinois Packing Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, supra (frozen beefribs).

of the bill of lading) that the goods were in apparent good order.

We find no prejudicial error in this lack. We assume that appellant had satisfactorily made out a prima facie case of delivery in good order. That case was met by the railroad's proof of the perishable character of the shipment and of its own compliance with the requirements of the tariff and the shipper's instructions. The ultimate burden of persuasion then lay with the shipper to prove, by showing specific acts of negligence, that notwithstanding such apparent compliance, the railroad had failed to use due care. Appellant, by never advancing beyond its prima facie case, did not meet that burden in this case. It thus failed to overcome the railroad's proof, persuasively tending to exclude the possibility of negligence. See *Chesapeake & O. R. Co.* v. *Thompson Mfg. Co.*, supra, 270 U.S. 416, 423.

Affirmed.

(Endorsed) Opinion Filed June 3, 1963.

Frank H. Schmid, Clerk.

H. OPINION OF HOUSE OF LORDS. F. O. BRADLEY & SONS LIMITED v. FEDERAL STEAM NAVIGATION CO. LTD.

Feb. 21, 22, 24, 25, 28, *and April* 4.

(Before Lords SUMNER, ATKINSON, WRENBURY, CARSON, and BLANESBURGH.)

F. O. BRADLEY AND SONS LIMITED *v.* FEDERAL STEAM NAVIGATION COMPANY LIMITED.*

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Bill of lading—Cargo of apples—Damage to cargo—Cause of damage—"Inherent defect, quality, or vice of the goods"—Onus of proof—Sea-Carriage of Goods Act 1904 (*No.* 14 *of* 1904).

Apples were shipped from Hobart (Tasmania) to the United Kingdom on board the defendants' steamship N. under bills of lading, each of which contained the following overriding provision: "This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea-Carriage of Goods Act 1904 *had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof and is issued subject to all the terms and provisions of and to all the exceptions from liability contained in such Act." And by the Sea-Carriage of Goods Act* 1904 *it was provided by sect.* 8, *subsect.* (2): *"In every bill of lading . . . unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped and supplied, neither the ship nor her owner . . . shall be responsible for damage to . . . the goods resulting from . . .* (D) *the inherent defect, quality, or vice of the goods." When the apples, after their arrival in the United Kingdom, were distributed to the trade, extensive damage was*

* Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

found by reason of the fact that a large proportion of the apples were proved to be affected with a species of internal browning. An action was accordingly brought by the endorsees of the bills of lading against the shipowners claiming damages for breach of contract: for negligence and unseaworthiness; and the plaintiffs alleged that although the apples were good shipping apples, suitable for the voyage in kind, in ripeness and in packing, they were damaged on account of the faulty ventilation of the ship. The defendants' case was that the N. was a seaworthy ship and they relied on sect. 8, sub-sect. 2(D), of the Act as exonerating them.

Held, that the damage was caused to the apples not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This was not the kind of risk which the Act called on the shipowners to bear and it was well within the words "resulting from . . . inherent quality or vice."

Decision of the Court of Appeal affirmed.

APPEAL by the plaintiffs from a judgment of the Court of Appeal (Bankes and Scrutton, L.JJ.; Atkin, L.J. dissenting) dated the 26th March 1926.

The plaintiffs in the action, who were fruit merchants carrying on business in London, sought to recover from the defendants in respect of damage caused to a large consignment of Tasmanian apples shipped on board the defendants' steamship *Northumberland*, in the month of April 1921, for carriage from Hobart (Tasmania) to London and Liverpool. The plaintiffs claimed as owners of the consignment, namely, 15,272 cases of apples, and as holder for value and (or) endorsees of six bills of lading in respect thereof. No question arose as to the plaintiffs' title to the goods. The main question in issue at the trial was whether the damage occurred during transit, and if so, whether the defendants were liable.

In the year 1921 when the voyage in question took place the *Northumberland* was under requisition to His Majesty's Government at fixed Blue Book rates, and in accordance with directions given the *Northumberland* had been directed to proceed to Hobart and other ports and there load, *inter alia*, a cargo of apples. In pursuance of such direction she arrived at Hobart on the 18th April 1921, where she loaded a cargo consisting of 144,610 cases of apples (including the plaintiffs' consignment) and 8822 trays of pears. She arrived at Tilbury on the 15th June, where she discharged her London cargo and then proceeded to Liverpool. When the London consignment of apples came into the hands of sub-purchasers it was found that a proportion of the apples were affected with a species of internal browning, and the Liverpool consignment was found to be similarly affected.

The plaintiffs' claim was based on breach of the contract to deliver safely evidenced by the bills of lading, and upon negligence and unseaworthiness in connection with the ventilation of the holds and the withdrawing of gases from the same.

The defendants' case was that the *Northumberland* was a seaworthy ship; that there had been no negligence in or about the carriage; and that the damage was due to the inherent quality of the apples shipped and (or) to decay, and they relied on sect. 8, sub-sect. 2(D), of the Australian Sea-Carriage of Goods Act 1904.

The facts and relevant terms of the bills of lading and of the sections of the Act are set out in Lord Sumner's opinion.

Branson, J. held that there must have been constitutional trouble with the apples, and that the vessel was not unseaworthy. He therefore directed judgment to be entered for the defendants. His decision was affirmed by the Court of Appeal (Bankes and Scrutton, L.JJ.; Atkin, L.J. dissenting).

The plaintiffs appealed.

Stuart Bevan, K.C., *S. L. Porter*, K.C., and *W. L. McNair* for the appellants.

W. A. Jowitt, K.C. and *G. St. C. Pilcher* for the respondents.

The House took time for consideration.

LORD SUMNER.—In 1921 the respondents' steamship *Northumberland* discharged from her refrigerated compartments a large quantity of Tasmanian apples at Tilbury. No casualty and no exceptional weather had befallen the ship. The apples appeared to be and on the surface were in excellent condition, but, soon after they had been distributed to the trade, extensive damage was found. It was of a kind quite new to shippers and shipowners generally. In 1922 the *Northumberland* again shipped a large quantity of apples and similar damage again occurred. In neither year was this kind of damage confined either to this ship or to ships fitted with the same grid-refrigerating system. A scientific investigation of apples and their diseases, with special reference to storage and transport by sea, was at that time in progress at Cambridge. Attention was directed to these mishaps in 1922, and in 1923 trained observers from Cambridge visted Australia to examine and report on local and transport conditions. This action was brought by endorsees of the bills of lading of part of the cargo of 1921.

The documents were in a form, which contained a full collection of the protective exceptions and clauses in which modern bills of lading abound, but, as the voyage was one to which the legislation of the Commonwealth of Australia applied, there was included the following overriding provision:—

CLAUSE PARAMOUNT.—This bill of lading is to be read and construed as if every clause therein contained, which is rendered illegal or null and void by the Sea-Carriage of

Goods Act 1904, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act.

A question was raised below, but not before your Lordships, as to the extent to which certain protective words in the bill of lading form survived elimination by the paramount clause, and particularly as to an exception of "decay," a limitation upon the amount of the ship's liability for damage, and a requirement of specially early notice of claim. I need say nothing on these points and will deal with the case, in the manner most favourable to the appellants: viz., as though the above Act exclusively governed the conditions of exemption from liability for damage brought to light during and at the end of the voyage. Your Lordships were not informed of anything in the law of the Commonwealth, except the above Act, that would affect the matter, and the bill of lading itself provides that "all questions arising under this bill of lading shall be settled according to the principles of English law."

The bill of lading described the goods as "shipped in apparent good order and condition" and proceeded "and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London." Though the usual words "in the like good order and condition" do not appear after the word "delivered," it was common ground that the ship had to deliver what she received, as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment, and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or miscon-

duct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.

Greatly to the advantage of a speedy and satisfactory trial, the statement of claim pleaded the plaintiffs' whole case, whether the burden of proof was strictly on them in the first instance or only passed to them in rebuttal, and the evidence was called in the same way. No real difficulty arises, now that all the evidence is out, in adjusting the obligation of proof in accordance with the strict rights of the parties.

The substance of the appellants' case was shortly as follows: The apples were good shipping apples, suitable for the voyage in kind, in ripeness, and in packing. They were damaged because they were kept during this long voyage in unventilated compartments. This was the active and exciting cause of the damage, but it was assisted by the fine weather met with on the voyage. This case was rested principally on the scientific investigation before mentioned, coupled with evidence taken at Hobart of the condition of the apples, when maturing in the orchards and when gathered, send down to Hobart and shipped.

The reply was this. The ship was in every way unexceptionable. Her refrigeration was effected by brine pipes, arranged within the refrigerated compartments themselves and not screened off from the adjacent cargo, though not in contact with it. When the compartments were loaded, pains were deliberately taken to close all apertures. Not only was no ventilation provided for the apples but the intention was to prevent it, except in so far as some interchange between the atmosphere in the refrigerated chambers and that outside them is inevitable. This, which the consignees said was the guilty cause of the damage, was in the eyes of the shipowners and their technical advisers the most beneficial mode of treatment and quite innocuous to any ordinary apples fit to be taken to sea at all.

The explanation of this apparent paradox is simple. In 1921 there were two systems in vogue for the carriage of fruit in refrigerated chambers, one that adopted in the *Northumberland* and many other ships, the other a system in which the refrigeration was effected by cooling air mechanically in a separate chamber and then forcing it by fans into the refrigerated chambers and out again. Both were pretty equally in use. Both types of ship had carried and delivered cargoes quite satisfactorily. With the exception of one little-known case in 1911, as to which but scanty evidence was forthcoming, no damage, such as occurred on this voyage, had ever been known before in the Tasmanian trade among practical men. According to the experience of the day the *Northumberland* was equipped and her refrigerating system was managed during the voyage in a perfectly proper manner. As for those on board, they could have admitted ventilation to the hold by removing hatches and otherwise but, in the then state of knowledge, they did not suppose and were not instructed that it would be right to do so. On this evidence Branson, J. found the ship to have been seaworthy at the commencement of the voyage and held that there had been no want of care in the course of it. In the Court of Appeal, Bankes and Scrutton, L.JJ. expressly agreed with him, while Atkin, L.J., who delivered a dissentient judgment, expressed no opinion on this point. Your Lordships, with very full assistance from counsel, have examined the evidence in detail and I think are unanimously of the same opinion as the majority in the Court of Appeal.

In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time. The words "properly equipped" in the Commonwealth Act also, in my opinion, import no absolute propriety, whatever that may be, but must be read as being relative only. For seaworthiness, the material time is the date of sailing; for due care, the

period of the voyage. There was, to say the least of it, no real reason at the time to condemn or to decry the unscreened grid arrangement adopted on the *Northumberland*, or the exclusion of ventilation, and it is only against these that any attack is made. They were in general and successful use. The other arrangements and systems were not markedly superior, if at all, and the damage now in question was virtually unknown under both. Nor could the ship be said to have been sent to sea in an unseaworthy condition, on the ground that the stoppage of ventilation could not be undone in case of need—if, for example, damage was found to be extending in the cargo—for, if ventilation was required, the ship had very ready means of admitting air when necessary, by opening hatches and so forth, and, to the extent to which, according to the knowledge of the time, this might be requisite, the officers were free and able to do so. They were not sent to sea fettered by inviolable orders never to alter the ventilation system at all, but they were instructed in what was believed to be the better system and in general they kept the holds sealed. Accordingly they could not be negligent in acting, like their masters, according to one of the accepted views of the time. In fact, during the voyage they were unaware that any damage was in progress.

On these findings the shipowners contend that they are excused by the exception in the Act of "inherent quality." These words, and not the other contiguous words, seem to me to be those most suitable for consideration, though, no doubt, the others form a material context. The whole clause in the Act runs as follows:

8 (2).—In every bill of lading with respect to goods, unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped and supplied, neither the ship, nor her owner, master, agent or charterer, shall be responsible for damage to or loss of

the goods resulting from . . . (*d*) the inherent defect, quality or vice of the goods.

Accordingly the following questions have to be asked: What was the actual damage and in what did it consist? What caused it? Did the cause arise on shipboard or during the voyage? If not, is there anything proved as to the fruit before shipment that shows the cause of the damage? If nothing is proved, is it admissible to infer, from the negation of all other causes, some unspecified idiosyncrasy, propensity or quality, inherent in the fruit, and if so, does such an inference establish "inherent quality or vice"?

The actual damage to the apples was entirely internal. The skin was intact and showed no sign of the state of things within. The core was unaffected, but the intermediate substance was brown, generally in patches but sometimes altogether so, and in this condition turned later on to decay and finally to dust.

About twenty per cent. of the entire cargo of apples is thought to have been damaged, but owing to the late date at which the mischief was discovered, the exact figure is not known. This percentage was distributed, not merely throughout the whole of the apple cargo or even throughout the whole of a single compartment, but throughout separate cases. Of two apples side by side, one might be damaged and the other sound, yet both might appear to be in perfect condition. This diversity is of great importance, but what determined it is not known.

The evidence of the scientific experts as the result of their observations was quite positive and unchallenged. The cause of this damage was exposure to an excessive concentration of carbon dioxide combined with an insufficient proportion of oxygen in the atmosphere, in which the apples were stored. They relied partly on laboratory experiments and partly on their observations on shipboard.

Their explanation was this. An apple, as part of its vital process, exhales carbon dioxide as the result of its consumption of oxygen from the atmosphere. There is an internal atmosphere also in the microscopical ducts and canals within the apple, in which an excess of carbon dioxide and a deficiency of oxygen may occur. When the external atmosphere to which the apple is exposed contains a concentration of carbon dioxide in excess of 13.6 per cent. danger begins, and, unless the atmosphere is corrected by ventilation, damage shortly follows. The apple suffocates and dies. Carbon dioxide, however, at a lower concentration has a beneficial effect. Up to ten per cent. it retards the process of ripening, and, at the normal storage temperature of 35 deg. Fahr., prolongs the apple's life. The experts said, with confidence, that the mischief was done in the *Northumberland's* holds. They had been intentionally sealed up so as to avoid ventilaton as far as possible. In such conditions she stifled her cargo of living apples, and the name of the disease, of which they died, was "Brown Heart."

According to the scientific witnesses and their printed report, "Brown Heart" is not a matter of infection or due to any parasitic organism. It is a pathological condition; a functional disorder. There is, however, another cause of damage in apples, which is called "Internal Breakdown." The visible symptoms of "Internal Breakdown" are the same as those of "Brown Heart." There is the same fair outside and the same decay within; the same brown spots or patches in the same intermediate portions of the apple. What causes "Breakdown" is not determined, but it is the *differentia* of "Brown Heart" that it is caused by ill-ventilated holds, and that of "Internal Breakdown" that it is not, for it arises somehow or other on shore.

In these circumstances the defendants called the *Northumberland's* captain and chief engineer and one of her refrigerating engineers, and their evidence has all along been

recognized to be of crucial importance. They said that in the course of their duties they entered the different refrigerated compartments in rotation, and thus paid several visits to each during the voyage. They were chiefly concerned to examine the brine pipes, but they also took some notice of the apples. The scientific witnesses candidly stated that on the one hand convection currents would distribute any carbon dioxide uniformly throughout the compartment. "Carbon dioxide mixes uniformly with the enclosed atmosphere and practically as quickly as it is formed": (Food Investigation Report, No. 12, p. 2). It would not fall to the bottom of the hold or hang about in patches or pockets. On the other hand, at a concentration of the order of seven per cent. of carbon dioxide, human beings die. Now these officers, one and all, were none the worse for it. They said they never noticed the presence of carbon dioxide, though they were quite alive to the risk that it might be there in quantities dangerous to themselves. Their credit as honest witnesses has not been impunged. Their routine of duty was probable in itself, was unlikely to have been neglected and was a matter about which mistake was hardly possible. Branson, J. accepted their evidence in its entirety, and if the case is left there, the apples were no more suffocated in the holds than were the officers. It is true that a similar routine was observed in 1922, when, according to the scientific witnesses, "Brown Heart" was indubitably the cause of the damage found on discharge, but it was the 1921 voyage and not that of 1922 that was tried, and I think we know too little of the later voyage to be guided by their conclusions about it.

The appellants met this difficulty at your Lordships' Bar by two explanations, neither, I think much developed at the trial. The excessive concentration of carbon dioxide, they said, would be dissipated from time to time by unintentional ventilation. The officers' visits always happened to occur when the carbon dioxide was at or below 7 per cent. In the much longer intervals when they were absent,

it accumulated to more than 13.6 per cent., and so remained for periods sufficient to cause the damage. No doubt, if it is assumed that the apples were suffocated as described, and if the evidence of the officers is nevertheless accepted, these singular phenomena must have occurred, since no others would be consistent with the premises. This may be logical, but I think it asks too much of coincidence. After all, the question is how the apples came to be damaged, now the theory of "Brown Heart" damage can successfully be vindicated. As for unintentional ventilation, no doubt there was some, but as express precautions had been deliberately taken to make it as little as possible it seems only fair to expect some precise determinations of the extent to which the atmosphere of one compartment could interchange with an adjacent atmosphere in a given time, and also of the extent to which that interchange would carry off the carbon dioxide and substitute normal air, and these were not forthcoming. Mere estimates took their place. All these compartments were below the shelter deck. The largest of them were lower holds and well below the water line. Interchange between 'tween decks and lower holds would not greatly change matters, and access to the outer air must chiefly have taken place, when the caps were periodically taken off the thermometer tubes in order to read the instruments.

It is plain that some method of accounting for the disappearance of a tell-tale quantity of carbon dioxide before the officers' visits came round, when it might have been remarked, was vital to the appellants' case. They suggested, disregarding the positive evidence of the engineers to the contrary, that, between the loading of the apples at Hobart and the clearing of the *Northumberland* for sea at Adelaide, no visits were paid to these holds, and that the combination of fairly high temperatures with fair weather at sea and still water in port would cause a great and rapid exhalation of carbon dioxide. Before the engineers began their inspection of the chambers on finally proceeding to sea, the dam-

age was done, though the fact was unsuspected. Hence the argumentative importance of unintentional ventilation. Nothing else could clear away this excessive accumulation after it had done its work and before the engineers entered the holds; nothing else could account for the fact that, although the uninjured apples must have been producing their accustomed quantity of carbon dioxide during the rest of the voyage, either there never was any excess over 6 or 7 per cent. or, if there was, it somehow made its exit regularly and before it could be observed. The suggested means by which the fatal quantity was so regularly reduced to one that was too small to be noticed was very largely the panting of the ship herself. No ship, it was said, can be built absolutely rigid, which is true, and a regular deformation of the sides or decks of a compartment, as the ship worked in a sea way, might alternately expel and inject air under pressure, through such crevices and apertures as might exist. There could have been no apertures, except such as were known and kept as far as possible tightly closed, because nothing went wrong either with the insulation or the hull, and no damage to the ship is suggested. Even if this effect was large it would fail to support the theory, if the foul air forced out was promptly drawn in again. I heard no reasonable explanation of the way in which a reciprocating bellows action, going on at the hatches, now out and now in, could regularly expel a foul atmosphere and as regularly draw in only a pure one. The 'tween deck hatches did not open direct into the outer air. Further, I find it impossible to believe that such a panting effect would be anything but minute, in the absence of evidence from practical marine architects and surveyors to coroborate the scientific, and, I take leave to add, the theoretic evidence of Dr. Kidd's assistants. With regard to the practical tests made in 1923 by isolating a few cases of apples in a box, kept among other apples in a hold fitted with grid refrigeration and not intentionally ventilated, I think that, although the results are striking, the scale of the experiments was too small and the

conditions were too little detailed in the evidence, to make them outweigh the great body of proof, which acquitted the absence of intended ventilation on this voyage of having caused the "Brown Heart" damage.

If, then, the mode of carriage did not damage the apples, their disease was not proved to be "Brown Heart," and if, on the other hand, it was not specifically proved to be "Breakdown" or any other known complaint of apples, must one not infer that the cause was after all some unidentified defect or some propensity in the particular apples, which suffered damage, when most of the apples escaped?

It was on this point that Atkin, L. J. based his dissentient judgment. He preferred the evidence of the scientific witnesses to the arguments against it based on the officers' visits to the holds and on practical experience. He expressed the opinion that under the Act the shipowners remained liable for damage occurring while the apples were on board, unless they could excuse themselves under some definite exception, and he concluded that, if the exception relied on was damage resulting from inherent quality or vice, they had failed to prove their defence. With the utmost respect for the learned Lord Justice's opinion, I am unable to agree with it. The evidence called by the respective parties was very different in kind. On the ætiology of this particular disease no doubt the scientific witnesses alone were of authority, but the question, whether on this particular voyage the apples were exposed to fatal doses of carbon dioxide, depended quite as much on the construction and management of the ship as on any matter of science, and Dr. Kidd himself, in an admission which was properly relied on by Branson, J., recognized that there might be room for some other cause than that to which he traced the damage. Again, accepting the Lord Justice's theoretic construction of the bill lading, it does not appear to me that on the present facts there is room for something unknown between insufficient ventilation and inherent quality or vice, nor can I

agree, if the cause of the damage was inherent quality or vice, that the shipowners would fail merely because they could not put a name to the vice or specify some particular inherent quality and distinguish it from all others. Both terms are quite general. When the common law makes the ship bear the risks of the voyage and of all that may happen to the cargo in the course of it, but excepts the act of God, the King's enemies and inherent vice, the scheme is evident. The act of God and the King's enemies neither party can wholly guard against, so the loss lies where it falls. For the rest, the carrier answers for his ship and men, the cargo-owner for his cargo. The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy, but of the cargo he knows little or nothing and, as the skipper has the advantage over him in this respect, he must bear the risks belonging to the cargo. Such being the scheme, to which the Commonwealth Act gives expression, can it be said either that the shipowners must fail, if they cannot specify what the particular quality or vice inherent in the cargo may have been, or if, having means of saving the cargo from the consequences of its own qualities or vices during the voyage, they have failed quite innocently to use them? In the first case, the cargo-owner is to say: "You may have cleared your ship and men, but even so, till you find out the actual and specific cause of the decay of my apples, you do not shift the risk to the cargo on to me." In the second he says: "If my cargo was stifling in your hold, as other living things would, because you did not give it air, you cannot escape liabiltiy for the resulting damage by saying that it is my fault for having apples that cannot stand being suffocated at sea."

The appellants, however, contended that their proof of the sound condition of the apples, when shipped, did something more than shift the burden of proof. To the admission in the bill of lading of the appearance of good condition, they had added a considerable body of evidence taken at Hobart early in the case, which showed that the whole

crop in the 1921 season, both early kinds and late, was exceptionally good, was favoured by weather and free from pests, and was harvested in a satisfactory manner. Many of the apples shipped and more particularly of those shipped by the appellants' sellers themselves came from the later ripening districts and were therefore less matured and better fitted to meet the trials of the voyage. These witnesses were not cross-examined to suggestions of any latent weakness or any seeds of disease then existing in the apples. Hence, it was said, inherent vice in general has been negatived in advance, and only specific proof on grounds not cross-examined to will even relieve the shipowner for the time being from the burden of clearing himself. When in addition to this, proof is given of a mode of carriage well known and in general use, which would have prevented the inherent quality of the apples in the widest sense of the term from resulting in damage at all, that damage cannot be shown to have resulted without liability to the ship even though seaworthiness and care be proved. It was further suggested that inherent vice is a term indicative of some abnormal defect or disease, and that the normal fact that apples are but mortal is not sufficient to satisfy this or the other expression used, viz., "inherent quality."

I am not able to assent to this contention. It appears to raise the old controversies about *causa causans* and *causa sine qua non* and to force into undue prominence the words "resulting from." I think it may be answered in either of two ways. Branson, J. argued thus. The evidence has eliminated the operation of an excessive concentration of carbon dioxide, to which the disease of "Brown Heart" was ascribed. If the apples did not die a natural death, some other failing must have caused it, and as they are not said to have been otherwise ill-treated on board ship, that failing must have been at least latent before shipment. The negation of the one establishes the other. It appears to me that this was a legitimate train of reasoning and your

Lordships are not called upon to dissent from it: (*Kendall* v. *The London and South-Western Railway Company*, 26 L. T. Rep. 735; L. Rep. 7 C.P. 373). The similarity of the appearances in the case of "Brown Heart" and of "Breakdown," and the common knowledge of mankind, that apples are but perishable things, afford material for saying that the damage was caused ashore and might well have arisen there without its having been possible to prove when it arose or where or how?

The other way is to say that the "inherent quality" referred to is not said to be an inherent bad quality and that the words are "resulting from" not "solely resulting from." The nature of the apples, which were damaged—whether they were simply weaker than their neighbours or had some idiosyncrasy—was such, that they could not stand the voyage. They decayed, not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This is the kind of risk which the Act does not call on the shipowner to bear, for he has had nothing really to do with it and it is, in my opinion, well within the words "resulting from . . . inherent . . . quality or vice."

I think that the appeal should be dismissed with costs and I move your Lordships accordingly.

I desire to add that my noble and learned friend, Lord Carson, concurs in this opinion and motion.

Lord ATKINSON.—I concur.

Lord WRENBURY.—I concur.

Lord BLANESBURGH.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett,* and *Co.*

Solicitors for the respondents, *William A. Crump* and *Son.*